94 825 NOV 7 1994

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WANDA SUE BRANDON,

PETITIONER

VS.

THE TRAVELERS INSURANCE COMPANY, AND ABBOTT LABORATORIES, ABBOTT LABORATORIES, INC.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles E. Jones, Jr.
Jones & Edwards, L.L.P.
P. O. Box 188
Sweetwater, Texas 79556-0188
(915) 235-4000
(915) 235-4004 (Telecopy)

ATTORNEYS FOR PETITIONER, WANDA SUE BRANDON

QUESTIONS PRESENTED

1. Does the broad Congressional mandate that ERISA be administered with national uniformity preempt state domestic relations laws which provide statutory methods for designating beneficiaries of employee welfare plan benefits that is contrary to the employee welfare plan documents controlled by ERISA?

2. Can the Fifth Circuit make specific findings of fact as a matter of law to determine if a party waived her rights under an ERISA plan pursuant to a decree of divorce that is contrary to the Congressional and United States Supreme Court mandate that pension plan regulation is exclusively a federal concern as set forth in Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)?

3. Can the Fifth Circuit affirm a summary judgment which required that the district court determine whether Wanda Brandon made a voluntary and good faith waiver from the facts and circumstances of the summary judgement evidence submitted to the district court?

LIST OF ALL PARTIES

The undersigned counsel of record for Petitioner, Wanda Sue Brandon, hereby certifies to the Supreme Court of the United States pursuant to Rule 14.1(b) of the Supreme Court Rules that the following is a list of all parties to the proceeding in the court whose judgment is sought to be reviewed, to-wit:

(a) Wanda Sue Brandon, Petitioner
1703 Marvin
Sweetwater, Texas 79556

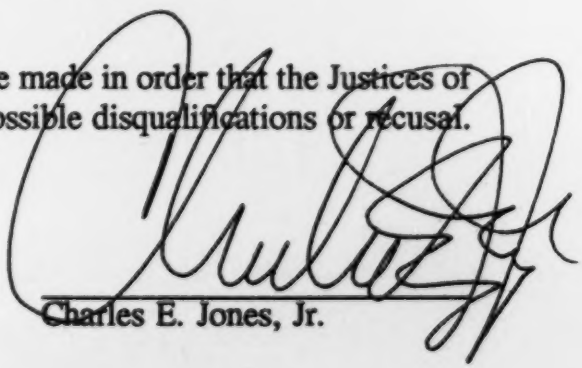
(b) The Travelers Insurance Company, Respondent
One Tower Square
Hartford, CT 06183

(The Travelers Insurance Company is a subsidiary of the Travelers Corporation, a publicly traded company. It has no subsidiaries or affiliates that have issued shares to the public.)

(c) Abbott Laboratories, Respondent
1921 Hurd Drive
Irving, Texas 75038

(Abbott Laboratories has no parents, subsidiaries or affiliates that have issued shares to the public in the United States.)

These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.



Charles E. Jones, Jr.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 3

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 19

CERTIFICATE OF SERVICE 20

INDEX TO APPENDIX

APPENDIX A

Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994) 21

APPENDIX B

Summary Judgment entered by district court 34

APPENDIX C

Granting of extension of time to file rehearing in Fifth Circuit 39

APPENDIX D
Denial of rehearing en banc on June 9, 1994 41

APPENDIX E
Granting of extension of time to file petition for a writ of certiorari to November 6, 1994 42

APPENDIX F
Texas Family Code §3.632 43
Texas Family Code §3.633 46

APPENDIX G
Statement of facts from Brandon divorce 49

APPENDIX H
Brandon final decree of divorce 55
Civil docket sheet 60

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981) 14

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) 14

Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1326 (5th Cir. 1994) 12, 12, 17-21

Brandon v. Travelers Ins. Co., 25 F.3d 1046 (5th Cir. 1994) 5

Brown v. Connecticut General Life Insurance Co., 934 F.2d 1193 (11th Cir. 1991) 17

Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114, 1118-19 (10th Cir. 1991) 17

Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 711 (2nd Cir. 1991) 20

Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 283 (7th Cir. 1990) 16, 17

Hansen v. Continental Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991) 17

Ingersoll-Rand Co. v. McClendon, [498 U.S. 133, 139], 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990) 16

Krishna v. Colgate Palmolive Co., 7 F.3d 11 (2nd Cir.

1993) 18

Leberman v. John Blair & Co., 880 F.2d 1555, 1560 (2nd Cir. 1989) 20

Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) 17

Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) 14

McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) 14-17

Metropolitan Life Insurance Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991) 16

Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976); cert. denied, 429 U.S. 1040 (1977) 20

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) 14, 16

PM Group Life Ins. Co. v. Western Growers Assurance Trust, 953 F.2d 543, 547 (9th Cir. 1992) 18

Settles v. Golden Rule Ins. Co., 927 F.2d 505, 508 (10th Cir. 1991) 16

TEXAS CASES **PAGE**

Forsman v. Forsman, 694 S.W.2d 112, 115 (Tex.App.-San Antonio 1985, writ ref'd n.r.e.) 23

Novotny v. Wittner, 731 S.W.2d 103 (Tex.App.-Houston [14th Dist.] 1987, writ ref'd n.r.e.) 21

Owen v. Porter, 796 S.W.2d 265, 268 (Tex.App.-San Antonio 1990, no writ) 20

Parker v. Parker, 683 S.W.2d 889, 890 (Tex.App.-Ft. Worth 1985, writ ref'd) 23

Thibodeaux v. Thibodeaux, 546 S.W.2d 663, 663-664 (Tex.Civ.App.-Beaumont 1977, no writ) . . . . . .

FEDERAL STATUTES **PAGE**

28 U.S.C. §1254 (1) 6

29 U.S.C. §1001, et seq 11

29 U.S.C. §1001(b)(West 1985) 13

29 U.S.C. §1002(1)(A) 21, 22

29 U.S.C. §1002(1)(West 1985) 14

29 U.S.C. §1056(d)(1) 6

29 U.S.C. §1056(d)(1) 12

29 U.S.C. §1104(a)(1)(D) 7, 15

29 U.S.C. §1132(e)(1) and (f) 9

29 U.S.C. §1144(a) 8, 14

TEXAS STATUTES **PAGE**

Tex. Fam. Code §3.631 (West 1993). 9, 20

Tex. Fam. Code §3.633 (West 1993) 22

Tex.Fam.Code Ann. §3.632 (West 1993) 12, 22

No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

WANDA SUE BRANDON,

PETITIONER

VS.

THE TRAVELERS INSURANCE COMPANY, AND ABBOTT LABORATORIES, ABBOTT LABORATORIES, INC.,

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Wanda Sue Brandon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit which adopted the Texas rule creating a presumption of waiver absent redesignation following divorce that was modified to require that any waiver be voluntary and in good faith which is contrary to the Congressional mandate and the opinions of this Court that employee benefit plans are exclusively federal concerns.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994), and appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the Northern District of Texas, Abilene Division, appears in Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on April 20, 1994. Petitioner was granted an extension of time to file a Petition for Rehearing En Banc to May 18, 1994 as set forth in Appendix C to this Petition. A timely Petition for Rehearing En Banc was filed on May 18, 1994. The Court of Appeals' denial of the Petition for Rehearing En Banc was issued on June 9, 1994, in Brandon v. Travelers Ins. Co., 25 F.3d 1046 (5th Cir. 1994) and is set forth in Appendix D to this Petition.

Petitioner was granted an extension of time to file a Petition for a writ of certiorari on September 13, 1994, by Antonin Scalia, Associate Justice of the Supreme Court of the United States. The Order granting Petitioner an extension of time requires that Petitioner file her Petition for writ of certiorari on November 6, 1994, as is set forth in Appendix E to this Petition. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the statutes involved in this matter are as follows:

(a) 29 U.S.C. §1002(1)(A) which states in part:

> "The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program

was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or ...."

(b) 29 U.S.C. §1056(d)(1) which states in part:

"**(d) Assignment or alienation of plan benefits**

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

(c) 29 U.S.C. §1104(a)(1)(D) which states in part:

"(a) **Prudent man standard of care**

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

. . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter."

(d) 29 U.S.C. §1144(a) which states in part:

"**(a) Supersedure; effective date**

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee

benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title...."

(e) Section 3.631 of the Texas Family Code which states as follows:

"§ 3.631. Agreement Incident to Divorce or Annulment

(a) To promote amicable settlement of disputes on the divorce or annulment of a marriage, the parties may enter into a written agreement concerning the division of all property and liabilities of the parties and maintenance of either or them. The agreement may be revised or repudiated prior to the rendition or the divorce or annulment unless it is binding under some other rule of law.

(b) In a proceeding for divorce or annulment, the terms of the agreement are binding on the court unless it finds that the agreement in not just and right. If the court finds the agreement is not just and right, the court may request the parties to submit a revised agreement.

(c) If the court approves the agreement, the court may set forth the agreement in full or incorporate it by reference in the decree of divorce or annulment." Tex. Fam. Code §3.631 (West 1993).

The other statutes relevant to this matter are Section 3.632 of the Texas Family Code and Section 3.633 of the Texas Family Code which are set forth in Appendix F because of their length.

STATEMENT OF THE CASE

The United States District Court for the Northern District of Texas, Abilene Division, had jurisdiction over this matter pursuant to 29 U.S.C. §1132(e)(1) and (f). This case involves the claim of a designated beneficiary and former

wife for life insurance benefits of an employee welfare benefit plan subject to the provisions of the Employee Retirement Income Security Act of 1974 ("**ERISA**"), 29 U.S.C. §1001, et seq.

Richard and Wanda Brandon were married for twelve years before Richard filed a petition for divorce in October of 1986. During the couple's separation but prior to finalizing the divorce, Richard obtained a position with Abbott Laboratories and enrolled in Abbott's life insurance, annuity retirement, and stock option programs. Despite the pending divorce, Richard designated Wanda as the primary beneficiary under Abbott's employee welfare benefit plans. Richard told Wanda that she would remain the beneficiary of the plans despite the filing and granting of the divorce.

Richard hired an attorney to file the petition for divorce and the divorce proceedings were held on March 30, 1988. A copy of the transcript from the hearing on the divorce proceedings is set forth in Appendix G. Wanda signed a waiver of citation and did not appear at the hearing because the parties had agreed to a division of their property. No agreement, however, was signed by the parties and neither party signed the decree of divorce. The judge granted the divorce and signed the decree which had been prepared by Richard's attorney.

The divorce decree provided in part as follows:

> **"Petitioner [Richard] is awarded the following as Petitioner's sole and separate property, and Respondent [Wanda] is divested of all rights, title, interest and claim in and to such property.....**
>
> **(8) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights relating to any profit-sharing plan, retirement plan,**

> **pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program existing by reason of Petitioner's past, present, or future employment."[1]**

The entire decree of divorce is set forth in Appendix H. After the divorce hearing, Richard and Wanda went to visit John Pennington, an insurance agent for State Farm who underwrote a life insurance policy on Richard's life. Richard had previously agreed that Wanda would remain the designated beneficiary on all life insurance and benefit plans, including the Abbott plans. (R.E. at 35; Tr. at 456). Richard reiterated his commitment to helping Wanda financially during this meeting with Pennington and Pennington assured Richard that there was nothing further he had to do to maintain Wanda as his primary beneficiary on the State Farm policy in response to an inquiry by Richard concerning the affect of the recent divorce on her beneficiary status. (R.E. at 52-52; Tr. at 488-489).

The Brandons continued to see each other and sustained many mutual social contacts after their divorce. (R.E. at 39; Tr. at 472). The Summary Plan Document controlling the disposition of Abbott Laboratories employee benefits, including the life insurance plan, advises employees that "[y]ou can name anyone as your beneficiary and you can change your designation at a later date by completing the appropriate form which is available from and **must** be submitted to your local Personnel or Benefits Office." (emphasis added). Richard never removed Wanda as his beneficiary or changed the designation in any manner. In December of 1989, Richard died after a two week illness.

After Richard's death, Abbott sent a letter to Wanda confirming that she was the primary beneficiary pursuant to

---

[1] **The district court relied on this language when it determined that Wanda could not maintain her cause of action to force Abbott and Travelers to pay her the life insurance proceeds.**

the terms and conditions of the benefit plan. Wanda filled out and returned the various forms sent to her by Abbott. Subsequently, she learned that Gary Brandon, Richard's brother and the contingent beneficiary under the plan, had received a check for $110,000 from Travelers under Richard's life insurance policy. Abbott had determined that under the Texas Family Code, a life insurance plan participant must redesignate an ex-spouse after divorce in order to maintain that ex-spouse as the designated beneficiary. Tex.Fam.Code Ann. §3.632 (West 1993). Because Richard had failed to redesignate Wanda after the divorce, Abbott concluded that Wanda could no longer collect the insurance policy proceeds under Texas law. Instead of interpleading the funds, however, Abbott chose to request that Travelers pay the insurance proceeds to the contingent beneficiary.

The district court granted the motion for summary judgment filed by Abbott and Travelers against Wanda on the grounds that the divorce decree was res judicata as to any rights Wanda might have in Richard's employment benefits. Wanda asserted on appeal that ERISA preempted the requirement under Texas law that an ex-spouse be redesignated after the rendition of a decree of divorce. Wanda also asserted that she never waived, knowingly or otherwise, her interests as a designated beneficiary under the life insurance policy.

The Fifth Circuit held that the anti-alienation provision of ERISA found in 29 U.S.C. §1056(d)(1) did not apply to this case because the language of this portion of ERISA applies only to pension plans while the life insurance policy purchased by Abbott on Richard's behalf was a welfare benefit plan under 29 U.S.C. §1002(1)(A). Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1324 (5th Cir. 1994). The Fifth Circuit agreed that ERISA preempts the application of state law under the circumstances of this case, but then proceeded to create a federal common law approach that adopted the Texas rule creating a presumption of waiver absent redesignation following divorce pursuant to §3.632 of the Texas Family Code. Id. at 1326. The Fifth Circuit then modified this approach to require that any waiver be voluntary and in good faith. Brandon v. Travelers Ins. Co., ***supra*** at 1326.

The Fifth Circuit proceeded to make factual findings from the record before it that Wanda voluntarily and in good faith waived her rights to the insurance policy proceeds. The Fifth Circuit held that it was bound to carry out the provisions of the agreement **"signed by the parties."** Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1327 (5th Cir. 1994) (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT ADOPTED A TEXAS RULE CREATING A PRESUMPTION OF WAIVER ABSENT REDESIGNATION FOLLOWING DIVORCE IN VIOLATION OF ERISA AND THE EXPRESS CONGRESSIONAL INTENT THAT THE PLAN DOCUMENTS CONTROL

The Fifth Circuit held that the designation of a beneficiary "relates to" the provision of an ERISA plan to a sufficient degree to preempt §3.632 of the Texas Family Code. Brandon v. Travelers Ins. Co., 18 F.3d 1321 (5th Cir. 1994). The Fifth Circuit then proceeded to adopt the Texas rule creating a presumption of waiver absent redesignation following divorce in compliance with §3.632 of the Texas Family Code which it modified to require that any waiver be voluntary and in good faith. Id. at 1326. The Fifth Circuit's fashioning of federal common law, however, was in direct violation of the Congressional intent that the plan documents control under ERISA and the prior decisions of this Court.

In ERISA, Congress set out to:

> **"protect ... participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appro-**

> **priate remedies, sanctions, and ready access to the Federal courts." § 2, as set forth in 29 U.S.C. §1001(b)(West 1985).**

ERISA comprehensively regulates, among other things, employee welfare benefit plans that, "through the purchase of insurance or otherwise," provide medical, surgical, or hospital care, or benefits in the event of sickness, accident, disability, or **death.** §3(1), 29 U.S.C. §1002(1)(West 1985)(emphasis added).

Congress specifically provided a provision relating to the clear and direct preemptive effect of the federal legislation:

> **"Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title...." 29 U.S.C. §1144(a)(West 1985).**

The question whether a certain state action is preempted by federal law is one of congressional intent. "The purpose of Congress is the ultimate touchstone." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). The Fifth Circuit declined, however, to follow the express intent of Congress and the prior decisions of this Court in this case.

This Court has observed in the past that the express preemption provisions of ERISA are deliberately expansive, and designed to "establish pension plan regulation as exclusively a federal concern." Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981). In McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990), the Sixth Circuit was confronted with a similar fact situation. Dr. Parrott created two vested ERISA plans at the time that he was married to Barbara Parrott, whom he named as the beneficiary. Later that year, the Parrotts were divorced and signed a joint settlement agreement in which they divided their marital property. The settlement contained a broad waiver clause in

which each spouse relinquished "any and all" claims he or she might have against the other. Id. at 311. Another section recited that Dr. Parrott was to receive all property not otherwise disposed of in the agreement. Despite this language, after the divorce Dr. Parrott never removed Barbara's name as beneficiary of the plans, never named another beneficiary, and they continued to see each other "socially." McMillian v. Parrott, ***supra*** at 311. Barbara was the designated beneficiary with the plan administrator at the time of Dr. Parrot's death. The district court dismissed Barbara's claims ruling that she had waived her rights as beneficiary by the divorce settlement.

The Sixth Circuit reversed the judgment of the district court because it found that the explicit provisions of ERISA made it clear that Barbara did not effectively waive her interest as Dr. Parrott's beneficiary. The Sixth Circuit stated:

> **"ERISA requires that a plan administrator discharge his duties "in accordance with the documents and instruments governing the plan...." 29 U.S.C. §1104 (a)(1)(D) (1985). Both plans state, "Each Participant shall be given the opportunity in an original election to designate a Beneficiary and from time to time the Participant may file with the Plan Administrator a new or revised designation in such form as the Plan Administrator shall provide." The designation of beneficiary under the plans named Barbara Parrott as Dr. Parrott's beneficiary, and continued to do so, unchanged, for four years after their divorce. This clear statutory command, together with the plan provisions, answer the question; the documents control, and those name Barbara Parrott.**
>
> **We believe this resolution fulfills the intent of Congress that ERISA plans be uniform in their interpretation and simple in their application. See H.Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S.**

> **Code Cong. & Admin.News 4639, 4650. A participant is master of his own ERISA plan. Dr. Parrott agreed to the plans, including the provision concerning the designation and change of beneficiary, kept these documents in his office, and did not change the beneficiary in over four years. Simply put, it was Dr. Parrott's designation which controls, not Barbara's intent. Under the plans, we determine his intent by the designation on file at the time of his death." McMillian v. Parrott, 913 F.2d 310, 311-312 (6th Cir. 1990).**

It is for this reason that ERISA plans are to be administered according to their controlling documents and not subject to the laws of any particular state. "Rules requiring payment to the named beneficiary yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming to them without the folderol essential under less-certain rules." Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 283 (7th Cir. 1990)(Easterbrook, J., dissenting).

In Metropolitan Life Insurance Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991), the decedent had named his wife as beneficiary under an ERISA life insurance policy, but divorced her prior to his death by suicide. The administrator of his estate sought the proceeds of the insurance policy, invoking Oklahoma statute which provided that the divorce voided the designation of the former wife as a beneficiary. The Tenth Circuit ruled in favor of the divorced wife, stating:

> "The basic preemption provision of ERISA is deliberately expansive. ***See*** Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47, 107 S.Ct. 1549, 1552-53, 95 L.Ed.2d 39 (1987); Settles v. Golden Rule Ins. Co., 927 F.2d 505, 508 (10th Cir. 1991). Unless otherwise encompassed in the saving clause, any state law relating to any ERISA plan is preempted. Pursuant to this section,
>
> A law "relates to" an employee benefit plan,

> in the normal sense of the phrase if it has a connection with or reference to such a plan. Under this "broad common sense meaning," a state law may "relate to" a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. Ingersoll-Rand Co. v. McClendon, [498 U.S. 133, 139], 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990) (citations omitted). ***Because the designation of beneficiaries to this life insurance policy "relates to" the ERISA plan, the preemption provision applies.*** ***See*** Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114, 1118-19 (10th Cir. 1991) (designated beneficiary's claim for wrongful denial of insurance proceeds is related to the plan); McMillian v. Parrott, 913 F.2d 310, 311 (6th Cir. 1990) ("The designation of beneficiaries plainly relates to these ERISA plans, and we see no reason to apply state law on this issue.") Id. at 906-907 (emphasis added).

The Eleventh Circuit followed the clear federal preemptive intent of Congress in Brown v. Connecticut General Life Insurance Co., 934 F.2d 1193 (11th Cir. 1991), holding that a second wife who was named beneficiary of a deceased husband's ERISA life insurance policy was entitled to the proceeds despite a competing claim by the first wife premised upon the divorce decree that dissolved the first marriage. Id. at 1197. The identical rational applies to the facts of the present case. ERISA and the plan documents control which do not contain any requirement for redesignation of the beneficiary after a divorce.

The Fifth Circuit relied upon Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990) and Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) in reaching its holding that the federal common law approach was the most persuasive resolution of the issues in this case. Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1326 (5th Cir. 1994). The fashioning of federal common law by the Fifth Circuit, however, is directly contrary to the

mandates of Congress found in ERISA and the prior opinions of this Court. Consistent with Congressional mandate, Richard Brandon and Wanda Brandon were entitled to rely on the terms and conditions of the Plan Documents prepared by Abbott, including the representations concerning the terms and conditions controlling the intended beneficiary of the benefit proceeds. Hansen v. Continental Ins. Co., 940 F.2d 971, 982 (5th Cir. 1991)("Any burden of uncertainty created by careless or inaccurate drafting of the summary must be place on those who do the drafting, and who are most able to bear that burden").

In Krishna v. Colgate Palmolive Co., 7 F.3d 11 (2nd Cir. 1993), the Second Circuit held that ERISA and the plan documents controlled the designation of the beneficiary of a insurance policy not the last will & testament of the plan participant. The Second Circuit stated the following in connection with its refusal to apply state law to the facts of the case:

> "Considerations of public policy reinforce the precedents that would bar the use of New York law to settle the issue presented by this appeal. There is a strong interest in uniform, uncomplicated administration of ERISA plans, many of which function in a number of states. ***See*** PM Group Life Ins. Co. v. Western Growers Assurance Trust, 953 F.2d 543, 547 (9th Cir. 1992). In this case, the Policy includes a clear provision calling for the filing of written designations to name or change a beneficiary. It would be counterproductive to compel the policy administrator to look beyond those designations into varying state laws regarding wills, trusts and estates, **or domestic relations** to determine the proper beneficiaries of Policy distributions." Krishna v. Colgate Palmolive Co., 7 F.3d 11, 16 (2nd Cir. 1993).

The same factors are present in this case. Administrators of ERISA plans should not be obligated to review the domestic relation laws of each and every state. The Abbott policy included a clear provision calling for the filing of a

written designation to name or change a beneficiary. Richard Brandon never designated anyone other than Wanda Brandon as his primary beneficiary. The uniform construction of ERISA plans demands that the last designation of Richard Brandon be honored.

This Court should grant certiorari to rule that the Congressional mandates of ERISA and the prior decisions of this Court prohibit the intrusion of federal common law based upon state law of domestic relations in determining the payment of ERISA plan benefits.

II. THE FIFTH CIRCUIT IMPROPERLY MADE FINDINGS OF FACT TO FIND EVIDENCE OF A VOLUNTARY AND GOOD FAITH WAIVER MADE BY PETITIONER WHICH WERE UNSUPPORTED BY THE EVIDENCE AND IGNORED THE CONGRESSIONAL MANDATE THAT ERISA BE ADMINISTERED WITH NATIONAL UNIFORMITY

The Fifth Circuit improperly made findings of fact from the summary judgment record that Wanda Brandon voluntarily and in good faith waived her interest in the $110,000 life insurance policy. Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1327 (5th Cir. 1994). The Fifth Circuit found, as a matter of law, that Wanda Brandon waived her rights in the insurance policy because:

> **(a) It was her choice not to hire an attorney;**
>
> **(b) She voluntarily choose to stay away from the divorce proceedings; and**
>
> **(c) The divorce settlement was quite generous to her interests as she received a considerable portion of the community estate, including both the house and the car jointly owned by the Brandons. Id. at 1327.**

The Fifth Circuit even stated:

> **"The divorce decree was a bona fide waiver**

> **of her rights to the insurance policy proceeds and we are bound to carry out the provisions of the *agreement signed by the parties*."** Brandon v. Travelers Ins. Co., ***supra*** at 1327 (emphasis added).

There was, however, no agreement signed by the parties in this case.

Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, **good faith** and other **subjective feelings** play dominant roles. Leberman v. John Blair & Co., 880 F.2d 1555, 1560 (2nd Cir. 1989)(emphasis added); Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976); cert. denied, 429 U.S. 1040 (1977); ***see also*** Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 711 (2nd Cir. 1991). The issue of good faith and voluntary waiver should have been resolved at trial rather than by summary judgment.

§3.631 of the Texas Family Code requires that any agreement concerning the division of the property and liabilities of the parties be in writing. Tex. Fam. Code §3.631 (West 1993). Owen v. Porter, 796 S.W.2d 265, 268 (Tex.App.-San Antonio 1990, no writ)(one spouse did not testify at trial and the Court held that the testimony of one spouse was a ineffective oral agreement incident to divorce that must be in writing). It is undisputed that there was no written agreement between Richard Brandon and Wanda Brandon in this case. The holding of the Fifth Circuit that it was bound to carry out the provisions of the agreement signed by the parties was erroneous as a matter of law. Wanda Brandon never voluntarily and in good faith waived her interest in the life insurance policy. The evidence clearly demonstrated that Richard and Wanda Brandon intended that she receive the life insurance benefits.

The Fifth Circuit held that the decree of divorce could operate as a waiver of ERISA benefits under its fashioning of federal common law which adopted §3.632 of the Texas Family Code with the voluntary and good faith modification. Brandon v. Travelers Ins. Co., 18 F.3d 1321, 1326 (5th Cir. 1994). The language contained in the decree of divorce, however, demonstrates the inconsistencies and hazards a plan

administrator will encounter as it attempts to implement the federal common law approach adopted by the Fifth Circuit.

The Fifth Circuit also held that ERISA's anti-alienation provision did not apply to the present case because the language of the anti-alienation provision applies only to pension plans while the life insurance policy purchased by Abbott on behalf of Richard Brandon was a "**welfare plan**" under 29 U.S.C. §1002(1)(A). Brandon v. Travelers Ins. Co., ***supra*** at 1324 (emphasis added). The plain language of the decree of divorce, however, could have only divested Wanda Brandon of her interest in Richard's "**profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program.**" There is no language contained in the decree of divorce whereby the court divested Wanda of her interest in any "**welfare plan**" or life insurance policy. The only case relied upon by Respondents for the proposition that the language in the decree of divorce divested Wanda of her interest in the life insurance policy is Novotny v. Wittner, 731 S.W.2d 103 (Tex.App.-Houston [14th Dist.] 1987, writ ref'd n.r.e.). In this case, the divorce decree of the parties employed similar language where the decree stated:

> "The [ex-spouse] is divested of all right, title, and interest in and to . . . [a]ny and all insurance, pensions, retirement benefits, and other benefits arising out of [the decedent's] employment . . . [and] . . . [a]ny and all policies of life insurance insuring [the decedent's] life." Id. at 105.

The Brandon decree of divorce **never** mentions, references or addresses "life insurance" anywhere in the decree.

If Respondents assert that Wanda was divested of her rights to the insurance policy because of the language "or other benefit program" then such language is limited to similar "programs" referred to in the same paragraph which are "pension plans" or "retirement plans" subject to the anti-alienation provisions of ERISA. 29 U.S.C. §1002(1)(A) (West 1985). The Texas Family Code makes a clear distinction between retirement benefits and life insurance benefits. §3.632 of the Texas Family Code states in part:

> "(a) In a decree of divorce or annulment, the court **shall** determine all rights of both spouses in an insurance policy, including life, casualty, liability, and health insurance." Tex. Fam. Code §3.632 (West 1993)(emphasis added).

§3.633 of the Texas Family Code states in part:

> "(a) In a decree of divorce or annulment the court shall determine all rights of both spouses in **any pension, retirement plan, annuity, or other form of savings, bonus, profit-sharing, or other employer or financial plan** of an employee, whether or not self-employed, **in the nature of compensation or savings.**" Tex. Fam. Code §3.633 (West 1993)(emphasis added).

The clear distinction under state law between life insurance and employee plans "in the nature of compensation" prohibited the Fifth Circuit from finding that Wanda waived her rights to the life insurance policy by virtue of the decree of divorce entered by the court. Parker v. Parker, 683 S.W.2d 889, 890 (Tex.App.-Ft. Worth 1985, writ ref'd)(In the absence of specific language dealing with both the ownership and beneficial interests of an insurance policy then the decree may not be construed as having terminated any beneficial interest that the other spouse may have had in the policy where decree awarded all right, title and interest of a policy to one spouse). The Fifth Circuit cannot adopt portions of the domestic relations law of the State of Texas concerning redesignation following divorce and ignore the remainder of the Texas Family Code where the decree specifically failed to address any insurance policies as required by §3.632 of the Texas Family Code.

The decree of divorce did not operate as a waiver of Wanda's rights to receive the life insurance policy benefits. The decree of divorce failed, as a matter of law, to address the insurance benefits attributable to either party. Wanda's attempt to recover the life insurance policy benefits do not constitute a collateral attack on the decree of divorce because the decree of divorce did not address or divide any insurance

benefits between the parties. Forsman v. Forsman, 694 S.W.2d 112, 115 (Tex.App.-San Antonio 1985, writ ref'd n.r.e.); Thibodeaux v. Thibodeaux, 546 S.W.2d 663, 663-664 (Tex.Civ.App.-Beaumont 1977, no writ). Wanda Brandon is still the owner of the life insurance benefits which were not addressed in the decree of divorce.

This Court should grant certiorari to rule that the decree of divorce did not divest Wanda Brandon of her interest in the life insurance policy because or, at the very least, a fact situation was presented to the district court and the Fifth Circuit concerning her intent which is a matter to be resolved at trial.

CONCLUSION

This Court should review this case because the undermining of the Congressional mandates of ERISA by the Fifth Circuit and other circuit courts is a matter of substantial importance and concern in the uniform and orderly administration of employee welfare benefit plans throughout the United States. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WHEREFORE, PREMISES CONSIDERED, Petitioner, Wanda Brandon, respectfully prays that this Court grant this petition for a writ of certiorari and for such other and further relief which Petitioner may show herself justly entitled.

Respectfully submitted,

JONES & EDWARDS, L.L.P.
Attorneys at Law
P. O. Box 188
Sweetwater, Texas 79556
Telephone: (915) 235-4000
Facsimile: (915) 235-4004

By: _____
CHARLES E. JONES, JR.
State Bar No. 10866000

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of November, 1994, a copy of the above and foregoing was delivered by certified mail, return receipt requested to the following attorney at record:

Catharina J.H.D. Haynes
Robert W. Kantner
Baker & Botts, L.L.P.
2001 Ross Avenue, Suite 700
Dallas, Texas 75201
Telephone: (214) 953-6515

ATTORNEYS FOR RESPONDENT,
ABBOTT LABORATORIES

and to

James K. Peden, III, P.C.
Michael R. Buchanan
Strasburger & Price, L.L.P.
901 Main Street, Suite 4300
Dallas, Texas 75202
(214) 651-4300
(214) 651-4330 (Telecopy)

ATTORNEYS FOR RESPONDENT
THE TRAVELERS INSURANCE COMPANY

Charles E. Jones, Jr.

APPENDIX A.

(Cite as: 18 F.3d 1321)

Wanda Sue BRANDON, Plaintiff-Appellant,

v.

The TRAVELERS INSURANCE COMPANY,
and Abbott Laboratories, Abbott Laboratories, Inc.,
Defendants-Appellees.

No. 92-9064.

United States Court of Appeals,

Fifth Circuit.

April 20, 1994.

Former wife of deceased insured brought suit seeking proceeds of life insurance policy. The United States District Court for the Northern District of Texas, Sam Ray Cummings, J., entered summary judgment against former wife, and she appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) anti-alienation provision of Employee Retirement Income Security Act (ERISA) did not apply; (2) Texas statute requiring redesignation of ex-spouse after divorce in order to maintain ex-spouse as designated beneficiary on life insurance policy was preempted by ERISA; and (3) under federal common law, divorce decree was bona fide waiver of former wife's rights to the proceeds. Affirmed.

[1] PENSIONS k138

296k138

Anti-alienation provision of ERISA applied only to pension plans, and thus did not apply to life insurance policy which was a welfare plan. Employee Retirement Income Security Act of 1974, §3(1)(A), 206(d)(1), 29 U.S.C.A. §1002(1)(A), 1056(d)(1).

[2] PENSIONS k22

296k22

ERISA will be found to preempt related state law even where state law is not specifically intended to regulate ERISA-covered plans. Employee Retirement Income Security Act of 1974, s 514(a), 29 U.S.C.A. s 1144(a).

[2] STATES k18.51

360k18.51

ERISA will be found to preempt related state law even where state law is not specifically intended to regulate ERISA-covered plans. Employee Retirement Income Security Act of 1974, s 514(a), 29 U.S.C.A. s 1144(a).

[3] PENSIONS k133

296k133

Texas statute requiring redesignation of ex-spouse after divorce in order to maintain ex-spouse as designated beneficiary on life insurance policy was preempted by ERISA. V.T.C.A., Family Code s 3.632; Employee Retirement Income Security Act of 1974, s 514(a), 29 U.S.C.A. s 1144(a).

[3] STATES k18.51

360k18.51

Texas statute requiring redesignation of ex-spouse after divorce in order to maintain ex-spouse as designated beneficiary on life insurance policy was preempted by ERISA. V.T.C.A., Family Code s 3.632; Employee Retirement Income Security Act of 1974, s 514(a), 29 U.S.C.A. s 1144(a).

[4] PENSIONS k22

296k22

In determining whether former wife whom former husband had not removed as designated beneficiary after divorce was

entitled to receive life insurance benefits from ERISA welfare plan, federal common law, rather than ERISA, supplied rule of law; accordingly, Texas rule creating presumption of waiver absent redesignation of ex-spouse after divorce would be adopted, as modified to require that any such waiver be voluntary and in good faith. V.T.C.A., Family Code s 3.632.

[5] PENSIONS k133

296k133

Although former husband had not removed former wife as designated beneficiary of life insurance policy governed by ERISA, under federal common law, divorce decree was a bona fide waiver of wife's rights to policy proceeds; although wife was not represented by lawyer during divorce and was not present at divorce proceedings, her waiver was voluntary and in good faith. V.T.C.A., Family Code s 3.632.

*1322 Joyce A. Keating and Bruce A. Coane, Coane & Associates, Houston, TX, for plaintiff-appellant.

James K. Peden, III and Michael R. Buchanan, Strasburger & Price, Dallas, TX, for Travelers Ins. Co.

Catharina J.H.D. Haynes and Robert W. Kantner, Baker & Botts, Dallas, TX, for Abbott Laboratories.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, JONES, [FN*] and DUHE, Circuit Judges.

FN* Judge Jones did not sit for oral argument due to illness but will participate in the opinion with the aid of the tape recording.

GOLDBERG, Circuit Judge:

Richard Brandon designated his wife, Wanda Sue Brandon, as the beneficiary on a life insurance policy taken

out by his employer, Abbott Laboratories ("Abbott"). The Brandons subsequently divorced. The divorce decree provided that each spouse would separately retain his or her own employment benefits. Richard did not, however, change the beneficiary designation on the life insurance policy as required by the Summary Plan Documents given to him by Abbott when the policy was established. Upon Richard's death, a conflict arose as to whether Wanda was entitled to receive his life insurance proceeds. When Abbott refused to pay the insurance proceeds, Wanda filed this suit in federal court against Abbott and Travelers Insurance Company ("Travelers"), the insurance company from whom Abbott had purchased Richard's policy. The district court entered summary judgment against Wanda, ruling that the divorce decree was res judicata as to her rights to receive the life insurance proceeds. Although we disagree with the district court's reasoning, we affirm the dismissal based on our interpretation of federal common law.

I. BACKGROUND

Richard and Wanda Brandon had been married for twelve years when, in October of 1986, Richard filed a petition for divorce. During the couple's separation but prior to finalizing the divorce, Richard obtained a position with Abbott Laboratories and enrolled *1323 in Abbott's life insurance, annuity retirement, and stock option programs. These plans were employee welfare benefit plans governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq. Despite the pending divorce, Richard designated Wanda as the primary beneficiary under each of the plans. [FN1] According to Wanda, Richard told her that she would remain the beneficiary on the plans regardless of the divorce.

FN1. His brother Gary was named as the contingent beneficiary under all of the plans.

Although Richard hired an attorney for the divorce proceedings, held on March 30, 1988, Wanda did not retain an attorney of her own. Richard and Wanda agreed to a

property division which Richard described to the court at the hearing. Wanda, for her part, signed a waiver of citation and did not appear in front of the divorce court. At the conclusion of the hearing, the judge granted the divorce and accepted the division of property agreed to by the parties.

The divorce decree provided that, "Petitioner [Richard] is awarded the following as Petitioner's sole and separate property, and Respondent [Wanda] is divested of all rights, title, interest, and claim in and to such property ... (8) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights relating to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program existing by reason of Petitioner's past, present, or future employment." [FN2]

FN2. The district court relied on this language when it determined that Wanda could not maintain the present action to force Abbott and Travelers to pay her the life insurance proceeds.

After their divorce, the Brandons continued to see each other and sustained many mutual social contacts. The Summary Plan Document controlling the disposition of Abbott Laboratories employee benefits, including the life insurance plan, advises employees that "[y]ou can name anyone as your beneficiary and you can change your designation at a later date by completing the appropriate form which is available from and must be submitted to your local Personnel or Benefits Office." (emphasis added). Richard never availed himself of the procedures to remove Wanda as the designated beneficiary. In December of 1989, Richard died after a two week illness.

After Richard's death, Abbott sent a letter to Wanda confirming that she was the primary beneficiary on the benefits plans. Wanda filled out and returned the various forms sent to her by Abbott. Subsequently, she learned that Gary Brandon, the contingent beneficiary, had received a

check for $110,000 from Travelers under Richard's life insurance policy. Abbott had determined that under the Texas Family Code, a life insurance plan participant must redesignate an ex-spouse after divorce in order to maintain that ex-spouse as the designated beneficiary. Tex.Fam.Code Ann. s 3.632 (West 1987). Because Richard had failed to redesignate his wife, Abbott concluded that Wanda could no longer collect the insurance policy proceeds under Texas law. Therefore, Abbott requested that Travelers pay the insurance proceeds to the contingent beneficiary, Gary Brandon.

Wanda instituted this action in the United States District Court for the Northern District of Texas eighteen months later against both Abbott and Travelers to recover the proceeds of the insurance policy and the other benefits arising out of Richard's employment. The district court granted the defendant's summary judgment motion against Wanda on the grounds that the divorce decree was res judicata as to any rights Wanda might have in Richard's employment benefits. This is an appeal from that judgment. [FN3]

FN3. Although Wanda noticed an appeal as to Abbott's denial of all Richard's employment benefits, the only plan with any value was the life insurance. Therefore, we have chosen to focus, in accordance with Wanda's argument on appeal, on the insurance policy proceeds alone.

II. DISCUSSION

As an initial matter, we note that the Supreme Court in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115, 109 S.Ct. 948, 956, 103 L.Ed.2d 80 (1989), held that when an administrator's denial of benefits is challenged, the decision is reviewed under a de novo standard unless the plan gives the administrator discretionary authority as to this decision. In the instant case, the plan requires that the company pay the insurance proceeds to the designated beneficiary unless for specified reasons the administrator determines that the contingent beneficiary should be paid. Because there is no discretionary authority in the administrator's decision, we review the denial of benefits to Wanda Brandon under a de novo standard. See Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114, 1118 (10th Cir.)

cert. denied, --- U.S. ----, 112 S.Ct. 670, 116 L.Ed.2d 761 (1991) (de novo standard applies when plan compels "the company to pay proceeds to the beneficiary of record.")

[1] The district court addressed two principal issues in disposing of the present case. First, the court held that the anti-alienation provision of ERISA did not prevent Wanda from waiving any rights she may have had to her husband's insurance benefits. Fox Valley & Vicinity Constr. Workers' Pension Fund v. Brown, 897 F.2d 275, 280 (7th Cir.1990) (en banc), cert. denied, 498 U.S. 820, 111 S.Ct. 67, 112 L.Ed.2d 41 (1990). [FN4] ERISA's anti-alienation provision, 29 U.S.C. s 1056(d)(1), states that, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The language of this portion of ERISA applies only to pension plans while the life insurance policy purchased by Abbott on Richard's behalf was a welfare plan under 29 U.S.C. s 1002(1)(A). [FN5] The anti-alienation provision of ERISA does not, therefore, apply to the present case.

FN4. We have previously held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. s 1056(d)(1)." Stobnicki v. Textron, Inc., 868 F.2d 1460, 1465 (5th Cir.1989).

FN5. 29 U.S.C. s 1002 provides that the "terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program ... established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing its participants or their beneficiaries, through the purchase of insurance or otherwise ... benefits in the event of sickness, accident, disability, [or] death."

Although the lower court's determination of this question

confirms that the anti-alienation provision of ERISA will not prevent a waiver of benefits in the instant case, this holding does not terminate our inquiry. The question remains whether the divorce decree is sufficient to affirmatively deny Wanda of any rights she may have had to Richard's insurance benefits. The district court addressed this question in its second holding, ruling that the present action to collect the insurance policy benefits was barred by the res judicata effect of Wanda's prior divorce decree. Baxter v. Ruddle, 794 S.W.2d 761, 762 (Tex.1990) (final divorce judgment precludes a collateral attack on the divorce court's disposition of property even if the divorce decree improperly divides the marital property). We decline to reach the substantive merits of this holding because we are persuaded that under federal common law, the divorce decree was an effective waiver of Wanda's rights. The district court failed to confront the question of whether Texas law will govern the designation of an ERISA plan beneficiary under these circumstances or whether any such law would be preempted by ERISA. Because the case law in this area is clear, we proceed to an analysis of the questions raised by ERISA preemption.

The difficult circumstances presented by the facts of the present case have been confronted with surprising frequency by a variety of our sister circuits. While these issues have not been previously faced by this court, we find some consistency in the treatment afforded by other circuits.

Appellees contend that the Texas Family Code requires a re-designation of an ex-spouse after divorce in order to maintain the ex-spouse as the designated beneficiary on a *1325 life insurance policy. Tex.Fam.Code Ann. s 3.632 (West 1987). In the instant case, for this redesignation statute to apply of its own accord, however, it must survive the wide preemptive sweep of ERISA.

[2] Congress mandated that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute. 29 U.S.C. s 1144(a). The Supreme Court has held that "the express pre-emption provisions of ERISA are deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' "Pilot Life Ins. Co. v.

Dedeaux, 481 U.S. 41, 45-46, 107 S.Ct. 1549, 1552, 95 L.Ed.2d 39 (1987) (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981)). In Shaw v. Delta Air Lines Inc., the Court clarified the meaning of the "relates to" language of the statute by stating that a "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983); see also Rodriguez v. Pacificare of Tex., Inc., 980 F.2d 1014, 1017 (5th Cir.) cert. denied, --- U.S. ---, 113 S.Ct. 2456, 124 L.Ed.2d 671 (1993). ERISA will be found to preempt a related state law even where the state law is not specifically intended to regulate ERISA covered plans. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990).

[3] Without exception, courts have held that ERISA preempts the application of state law under the circumstances of this case. Facing a situation similar to the one under consideration here, the Sixth Circuit held that the "designation of beneficiaries plainly relates to these ERISA plans, and we see no reason to apply state law on this issue." McMillan v. Parrott, 913 F.2d 310, 311 (6th Cir.1990); see also Brown v. Connecticut General Life Ins. Co., 934 F.2d 1193, 1195 (11th Cir.1991) (citing McMillan for the proposition that "[t]he determination of the beneficiary of the proceeds of an insurance policy plainly relates to an employee benefit plan"). The Second, Seventh, and Eighth Circuits have all made similar decisions finding that the designation of beneficiaries is well within the area of state law preempted by ERISA. Krishna v. Colgate Palmolive Co., 7 F.3d 11, 15 (2nd Cir.1993); MacLean v. Ford Motor Co., 831 F.2d 723 (7th Cir.1987); Lyman Lumber Co. v. Hill, 877 F.2d 692, 693 (8th Cir.1989). We agree with the reasoning of these cases and hold that the designation of a beneficiary "relates to" the provision of an ERISA plan to a sufficient degree to be preempted by that statute. [FN6]

FN6. Because our interpretation of federal common law provides a satisfactory resolution of the issues of this

case, we find it unnecessary to determine whether the divorce decree here is exempted from the pre-emption provisions of ERISA as a qualified domestic relations order ("QDRO"). 29 U.S.C. s 1056(d)(3)(B)(i)(I). See Carland, 935 F.2d at 1120 (QDRO exception will apply to exempt both pension and welfare benefit plans from ERISA preemption).

Having passed upon preemption, we next move to the second step in the determination of a parties' rights in an ERISA plan. Because we have determined that state law is preempted in this case, we must now ascertain the law that is applicable to the controversy. Therefore, we "look to either the statutory language or, finding no answer there, to federal common law which, if not clear, may draw guidance from analogous state law." McMillan, 913 F.2d at 311. Courts that have faced the issues presented by this case have split as to whether ERISA itself supplies the rule of law or whether judges must look to federal common law for the controlling principles.

The Sixth Circuit in McMillan decided that Section 1104(a)(1)(D) of ERISA specifically addressed the instant situation. McMillan, 913 F.2d at 311-12. That section requires that a plan administrator administer the plan "in accordance with the documents and instruments governing the plan...." 29 U.S.C. s 1104(a)(1)(D) (1985). The McMillan court held that Section 1104 of ERISA is clear in requiring that plan administrators follow the plan documents and therefore the court in that case required the administrator to follow the plan documents in making beneficiary designation determinations. The ex-husband in McMillan, as here, never removed his former wife as the designated *1326 beneficiary on his ERISA profit-sharing plan and a conflict arose between the plan documents requiring all changes be filed with the plan administrator and the divorce decree divesting the ex-wife of any interest in the plan. The court held that the "clear statutory command, together with the plan provisions, answer the question; the documents control, and those name [the ex-wife]." McMillan at 311-312.

The alternative approach taken by courts faced with a similar problem to the one we face today is to look to federal common law to resolve the question of how beneficiaries are designated. See Fox Valley 897 F.2d at 281; Lyman

Lumber, 877 F.2d at 693. The courts in Fox Valley and Lyman Lumber asked whether there was a valid, specific waiver of benefits in the divorce decree to which the court, under the auspices of federal common law, could give effect. Id.

The Fox Valley court looked to state law for guidance in determining whether to give effect to a waiver of benefits through a divorce decree. The court, in fashioning federal common law, looked to Illinois family law which provided that a divorce decree will not effect the pension rights of a designated beneficiary unless the property settlement specifically included a termination of those rights. Fox Valley, 897 F.2d at 281-82. The Fox Valley court held that under Illinois state law, the divorce settlement in that case was sufficient to divest the wife of her rights to her ex-husband's employment benefits. The court asserted that the "ability of a spouse to waive rights to a benefit through a specific waiver in a divorce settlement has been recognized by many [state] courts and we adopt that rule for purposes of ERISA." Id. at 281. The Seventh Circuit adopted state law through federal common law and determined that the provision in the divorce decree divesting the wife of her rights to the benefits in question, should be enforced. Id.

[4] We find that the federal common law approach outlined by the court in Fox Valley to be the most persuasive resolution of the issues of this case. Federal respect for state domestic relations law has a long and venerable history. When courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that state law should be given precedence:

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.... This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern. De Sylva v. Ballentine, 351 U.S. 570, 580, 76 S.Ct. 974, 980, 100 L.Ed. 1415 (1956) (citations omitted).

The law of family relations has been a sacrosanct enclave, carefully protected against federal intrusion. One way our federalist system maintains the integrity of the folkways and mores of localities is through the conservation of state control over the creation and separation of families. We do not, however, mean to infer that this sacrosanctity should be impenetrable.

In this case, as urged by Abbott, we adopt the Texas rule creating a presumption of waiver absent redesignation following divorce. Tex.Fam.Code Ann. s 3.632. However, in looking to state family law for guidance, we recognize that wholesale adoption of the Texas redesignation statute will not sufficiently protect the interests of beneficiaries. Thus, in our fashioning of federal common law, we modify the adoption of state law to require that any waiver be voluntary and in good faith. Our approach is bolstered by Lyman Lumber in which the Eighth Circuit took a similar tact in utilizing a modified state law to breathe life into the federal common law.

In that case the court concluded that a divorce decree which stated that the husband "shall have as his own, free of any interest of [his ex-wife], his interest in the profit-sharing plan of his employer" was not sufficient to revoke the wife's interest. 877 F.2d at 693. The Lyman court ruled that the wife had not effectively waived her rights to his employment benefits under this language because there were no terms "specifically divesting the spouse's rights as a beneficiary under the policy or plan." Id. The holding in Lyman is such as to require that courts look with *1327 great perspicacity in finding a waiver of benefits by a divorce decree. In Fox Valley, the Seventh Circuit took a similar approach to the waiver. The waiver executed by the wife in the divorce settlement at issue in that case provided that "[t]he parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party." 897 F.2d at 277. The court in Fox Valley held that "[u]nlike the factual setting in Lyman, [the spouses] in the present case signed a voluntary property settlement agreement that included an explicit mutual waiver of any rights each might have had in the other's pension plan." Id. at 280.

Thus, we follow the courts in Fox Valley and Lyman Lumber by requiring under federal common law that any waiver of ERISA benefits be explicit, voluntary, and made in good faith. Although the district court in the instant case did not reach the question of ERISA preemption and therefore never made findings as to whether the decree is the sort of good faith waiver which should be enforced, we are able, from the record as it is before us, to make the required determinations.

[5] The appellant Wanda Brandon has made various allegations as to her lack of knowledge about the specifics of the settlement and as to the fact that she was neither represented by a lawyer during the divorce nor was she present at the divorce proceedings. However, it is clear that it was her choice not to hire an attorney and to stay away from the divorce court. The settlement was quite generous to her interests as she received a considerable portion of the community estate, including both the house and car jointly owned by the Brandons. Her representations simply are insufficient to raise a genuine issue as to the voluntary nature and good faith basis of the waiver, and, we therefore find no reason to alter the judgment in this case. Factually, the situation of this case is not unusual to the experience of the nation's divorce courts. Parties in divorce litigation often trade and exchange their property with one another. The state courts of our country often oversee the type of agreement signed by the Brandons, which, in the ordinary case, offer sufficient protection of the rights of the parties. The oversight of the family courts is suitably armored to protect the rights at stake in this case and we find the approach of this opinion preferable to asserting that ERISA should act as a surrogate law of divorce. The divorce decree was a bona fide waiver of her rights to the insurance policy proceeds and we are bound to carry out the provisions of the agreement signed by the parties. We find that summary judgment was the proper disposition of Wanda Brandon's suit and although our reasoning may differ, we find no objection to the result.

III. CONCLUSION

The order granting summary judgment is AFFIRMED.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

WANDA SUE BRANDON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE TRAVELERS INSURANCE CO. and ABBOTT LABORATORIES, INC.,	)	
	)	
Defendants.	)	
	)	Civil
	)	Action
	)	No.
	)	CA-1-91-121-C

ORDER

Came on for consideration Defendants' Motion for Summary Judgment, filed July 30, 1992. The Court, after consideration of the arguments of counsel and review of the pleadings, finds that the motion for summary judgment should be granted.

Defendant argues that no genuine issue of material fact exists as to whether Plaintiff waived her right to recover employee benefits in the divorce decree, and that Defendant also argues that Tex. Fam. Code Ann. §§ 3.632 and 3.633 supports its decision to pay the proceeds under the plan to the alternate beneficiary. Plaintiff argues that the divorce decree did not constitute an effective waiver of her rights to benefits under her ex-husband's employee benefit plan. Plaintiff also argues that ERISA, 29 U.S.C. § 1001 et seq. preempts any state law which would divest a former spouse of employee benefits. Because this Court finds that the divorce decree effectively divested Plaintiff of any rights to the benefits, the effect of ERISA on §§ 3.632 and 3.633 of the Family Code has not been reached.

I.

ERISA was enacted to make more secure the pension rights of employees. Stobnicki v. Textron, Inc., 868 F.2d 1460, 1462 (5th Cir. 1989) (quoting S.R. No. 93-127, 93d Cong., 2d Sess. (1974)). Measures allowing a participant to designate a beneficiary are apparently for the future protection of the employees, rather than for the benefit of a third party. Employees Sav. Plan of Mobil Oil Corp. v. Geer, 535 F.Supp. 1055 (S.D.N.Y. 1982).

Plaintiff argues that ERISA's anti-alienation provision preempts waiver by a non-participant in the plan. See 29 U.S.C. § 1056 (d) (Supp. 1991). In support of this position, Plaintiff relies on a dismissing opinion in Fox Valley & Vicinity Constr. Workers' Pension Fund v. Brown, 897 F.2d 275, 282-83 (7th Cir. 1990), cert. denied, _____ U.S._____, 111 S.Ct. 67, 112 L.Ed.2d 41 (1990). Notwithstanding Plaintiff's arguments to the contrary, it appears that Plaintiff misinterprets the anti-alienation provisions of ERISA in much the same way as did the beneficiary in Fox Valley. Fox Valley plainly stated that the anti-alienation restrictions in ERISA apply to assignment or alienation of benefits by a participant, and not to the waiver of benefits by a beneficiary. Id. at 279. Because the anti-alienation provisions do not apply to Plaintiff, no exception need be found. McLaughlin v. Lindemann, 853 F.2d 1307 (5th Cir. 1988), does not require a different result because that case involved alienation of a participant's benefits.

II.

The decree of divorce between Richard and Wanda Sue Brandon expressly divested her of:

> Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights

> relating to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or any other benefit program existing by reason of [Richard's] past, present, or future employment.

Decree of Divorce, at 2. A reciprocal phrase divested Richard of similar rights to Wanda Sue's benefits. Decree of Divorce, at 3. Plaintiff did not appeal the decree.

If an appeal is not perfected from a divorce decree, res judicata bars a subsequent collateral attack even if the divorce decree improperly divided the property. Baxter v. Ruddle, 794 S.W.2d 761, 762-63 (Tex. 1991) (citing Segrest v. Segrest, 649 S.W.2d 610 (Tex.1983), cert. denied, 464 U.S. 894 (1983), and Cook v. Cameron, 733 S.W.2d 137, 140 (Tex. 1987)). If the decree is plain and unambiguous, the court must give literal effect to its language. Baxter, 749 S.W.2d at 763 (citing Adams v. Adams, 214 S.W.2d 856, 857 (Tex.Civ.App.--Waco 1948, writ ref'd n.r.e.).

The federal courts have also consistently refused to retroactively invalidate final judgments from state courts, even though those judgments may have been wrong or based on legal principles subsequently overruled. Eichelberger v. Eichelberger, 584 F. Supp. 899, 901 (S.D. Tex. 1984) citing Wilson v. Wilson, 667 F.2d 497, 499 (5th Cir. 1982), cert. denied, 458 U.S. 1107).

The language of the divorce decree clearly and unambiguously divests Plaintiff of all rights to any benefits arising from Richard's employment. Similar language has been held sufficient to divest a party of both ownership and beneficial interest in an insurance policy. Novotny v. Wittner, 731 S.W.2d 103 (Tex.App.--Houston [14th Dist.} 1987, writ ref'd n.r.e.). Plaintiff may not collaterally attack the judgment before this court and she is bound by its terms.

III.

The effect of the decree of divorce is dispositive of the issues before this Court. Because of this, the Court declines to rules on the effect of ERISA on Tex. Fam. Code Ann. §§ 3.632 and 3.633.

It is, therefore, ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**. The Clerk shall provide a copy of this order to each attorney of record.

Dated this 12th day of November, 1992.

SAM R. CUMMINGS
United States District Judge

APPENDIX C.

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of The Clerk

Charles R. Fulbruge III
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

May 9, 1994

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 92-9064- Brandon vs. Travelers, ET AL.

(D.C. No. 1:91-CV-121-C)

The following action has been taken:

(X) AN EXTENSION OF TIME has been granted to and including

MAY 18, 1994**

( ) for filing appellant's/petitioner's brief.
( ) for filing appellee's/respondent's brief.
( ) for filing reply brief.
(x) for filing petition for rehearing - APPELLANT
( )

( ) Enclosed order has been entered.
( ) Motion to consolidate granted.
( ) Motion to supplement or correct the record granted.
( ) Motion for leave to file supplemental brief granted.
( ) Motion for leave to file brief amicus curiae granted.
( )

( ) Motion to file bill of costs out of time granted.

( ) Approved bill of costs enclosed.

( ) Motion of appellant to reinstate the appeal is granted.

( ) Transcript due within fifteen (15) days from this date.

( ) Appellant's brief/record excerpts due within forty (40) days from this date.

( )

( ) By copy of this letter, the District Court Clerk is requested to return the record and or exhibits.

CHARLES R. FULBRUGE III, Clerk

By: Donna L. Mendez
Deputy Clerk

Mr. Bruce A. Coans
Mr. James K. Peden, III
Ms. Catharina J. H. D. Haynes

**MUST BE PHYSICALLY FILED IN THIS OFFICE BY DUE DATE.

APPENDIX D.

(Cite as: 25 F.3d 1046)
Brandon (Wanda Sue)
v.
Travelers Insurance Company, Abbot Laboratories,
Abbott Laboratories, Inc.
NO. 92-9064
United States Court of Appeals,
Fifth Circuit.
June 09, 1994

N.D.Tex.,
18 F.3d 1321
DENIALS OF REHEARING EN BANC.

(The decision of the Court is referenced in a Fifth Circuit "Table of Denials of Rehearing En Banc" appearing in the Federal Reporter.)

APPENDIX E.

SUPREME COURT OF THE UNITED STATES

NO.

A-181

WANDA SUE BRANDON,
PETITIONER

V.

TRAVELERS INSURANCE COMPANY, ET. AL.
RESPONDENTS

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

November 6 ,1994.

/s/ Antonin Scalia
Associate Justice of the Supreme Court of the United States

APPENDIX F.

VERNON'S TEXAS STATUTES AND CODES ANNOTATED FAMILY CODE TITLE 1. HUSBAND AND WIFE SUBTITLE A. THE MARRIAGE RELATIONSHIP CHAPTER 3. DISSOLUTION OF MARRIAGE SUBCHAPTER C. SUIT

Current through the Regular Session of the 73rd Legislature (End).

Sec. 3.632. Disposition of Beneficial Interests in Insurance

(a) In a decree of divorce or annulment the court shall determine all rights of both spouses in an insurance policy, including life, casualty, liability, and health insurance.

(b) If a decree of divorce or annulment is rendered after an insured has designated the insured's spouse as a beneficiary under a life insurance policy in force at the time of rendition, a provision in the policy in favor of the insured's former spouse is not effective unless:

(1) the decree designates the insured's former spouse as the beneficiary;

(2) the insured redesignates the former spouse as the beneficiary after rendition of the decree; or

(3) the former spouse is designated to receive the proceeds in trust for, on behalf of, or for the benefit of a child or a dependent of either former spouse.

(c) If a designation is not effective under Subsection (b) of this section, the proceeds of the policy are payable to the named alternative beneficiary, or, if there is not a named alternative beneficiary, to the estate of the insured. An insurer who pays the proceeds of a life insurance policy issued by the insurer to the beneficiary under a designation that is not effective under Subsection (b) of this section is

liable for payment for the proceeds to the person or estate provided by this subsection only if:

(1) before payment of the proceeds to the designated beneficiary, the insurer receives written notice at the home office of the insurer from an interested person that the designation is not effective under Subsection (b) of this section; and

(2) the insurer has not interpleaded the proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

(d) If a decree of divorce or annulment does not determine all of the rights of both spouses in an insurance policy other than life insurance in effect at the time the decree is rendered, the policy remains in effect until it expires according to its own terms. The proceeds of a valid claim under the policy are payable as follows:

(1) if the interest in the property insured was awarded solely to one former spouse by the decree, to that former spouse;

(2) if an interest in the property insured was awarded to each former spouse, to those former spouses in proportion to the interests awarded; or

(3) if the insurance coverage is directly related to the person of one of the former spouses, to that former spouse. The failure of either former spouse to change the endorsement on the policy to reflect the distribution of proceeds established by this section does not relieve the insurer of liability to pay the proceeds or any other obligation on the policy.

(e) Except as provided by Subsection (d) of this section, this section does not affect the right of a former spouse to assert an ownership interest in an undivided insurance policy, as provided by Subchapter F of this chapter.

(FN1)

1993 Main Volume Credit(s)

Added by Acts 1987, 70th Leg., 2nd C.S., ch. 50, Sec. 1, eff. Nov. 1, 1987. FN1 Section 3.90 et seq.

HISTORICAL NOTES
HISTORICAL AND STATUTORY NOTES
1993 Main Volume Historical and Statutory Notes

Section 7 of the 1987 Act provides:

"This Act takes effect November 1, 1987, and applies only to an order, decree, or judgment rendered on or after that date."

Acts 1989, 71st Leg., ch. 371, Sec. 10(a) provides:

"The amendments to Chapter 3 and Subsection (d), Section 3.70, Family Code, made by Chapter 50, Acts of the 70th Legislature, 2nd Called Session, 1987, apply to a cause of action pending on or brought after November 1, 1987."

APPENDIX F. (cont.)

VERNON'S TEXAS STATUTES AND CODES ANNOTATED FAMILY CODE TITLE 1. HUSBAND AND WIFE SUBTITLE A. THE MARRIAGE RELATIONSHIP CHAPTER 3. DISSOLUTION OF MARRIAGE SUBCHAPTER C. SUIT

Current through the Regular Session of the 73rd Legislature (End).

Sec. 3.633. Disposition of Beneficial Interests in Retirement Benefits and Other Financial Plans

(a) In a decree of divorce or annulment the court shall determine all rights of both spouses in any pension, retirement plan, annuity, or other form of savings, bonus, profit-sharing, or other employer or financial plan of an employee, whether or not self-employed, in the nature of compensation or savings.

(b) If a decree of divorce or annulment is rendered after a spouse has designated the other spouse as a beneficiary under a financial plan described by this section in force at the time of rendition, a provision in the plan in favor of the designated spouse is not effective unless:

(1) the decree designates the former spouse as the beneficiary;

(2) the designating spouse redesignate the former spouse as the beneficiary after rendition of the decree; or

(3) the former spouse is designated to receive the proceeds or benefits in trust for, on behalf of, or for the benefit of a child or dependent of either former spouse.

(c) If a designation is not effective under Subsection (b) of this section, the benefits or proceeds are payable to the named alternative beneficiary, or, if there is not a named alternative

beneficiary, to the designating former spouse. A business entity, employer, pension trust, insurer, or other person obligated to pay benefits or proceeds on a financial plan covered by this section who pays the benefits or proceeds to the beneficiary under a designation that is not effective under Subsection (b) of this section is liable for payment of the benefits or proceeds to the person provided by this subsection only if:

(1) before payment of the benefits or proceeds to the designated beneficiary, the payor receives written notice at the home office or principal office of the payor from an interested person that the designation of the beneficiary or fiduciary is not effective under Subsection (b) of this section; and

(2) the payor has not interpleaded the benefits or proceeds into the registry of a court of competent jurisdiction in accordance with the Texas Rules of Civil Procedure.

(d) This section does not affect the right of a former spouse to assert an ownership interest in an undivided pension, retirement, annuity, or other financial plan described by this section as provided by Subchapter F of this chapter. (FN1)

(e) This section does not apply to the disposition of a beneficial interest in a retirement benefit or any other financial plan of a public retirement system as defined by Section 802.001, Government Code.

1993 Main Volume Credit(s)

Added by Acts 1987, 70th Leg., 2nd C.S., ch. 50, Sec. 1, eff. Nov. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 179, Sec. 2(c), eff. Sept. 1, 1989. FN1 Section 3.90 et seq.

HISTORICAL NOTES
HISTORICAL AND STATUTORY NOTES
1993 Main Volume Historical and Statutory Notes

Effective date and application of the 1987 Act, see note following Sec. 3.632.

The 1989 amendment, in subsec. (e), substituted "802.001, Government Code" for "12.001, Title 110B, Revised Statutes".

APPENDIX G.

IN THE COUNTY COURT-AT-LAW

NOLAN COUNTY, TEXAS

IN THE MATTER OF THE MARRIAGE OF RICHARD LAMOND BRANDON	X X
WANDA SUE BRANDON	X X
NO. CC-502	X X

* *

STATEMENT OF FACTS
(Final hearing on divorce)

* *

APPEARANCES

For the Petitioner: Mr. Frank W. Conard II
107 East Third
Sweetwater, Texas 79556

For the Respondent: (Not appearing)

* *

BE IT REMEMBERED that on the 30th day of March, 1998, before the Honorable Robert M. Faver, Judge of said Court, in the City of Sweetwater, County of Nolan, State of Texas, whereupon the following proceedings were had:

RICHARD LAMOND BRANDON,

The Petitioner, having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. CONARD:

Q Ricky, would you state your name and address for the record?

A Richard L. Brandon, 436 Red River Trail, Number 1117, Irving, Texas.

Q And you are the Petitioner in this divorce petition, are you not?

A Yes.

Q And at the time you filed this petition, you and Wanda had lived here in Nolan County for more than six months?

A Correct.

Q You are married to Wanda Sue Brandon, thirty-one years of age, and who still lives here in Sweetwater, are you not?

A Yes.

Q And you are thirty-two years of age?

A No, not exactly. Thirty-four.

Q Ya'll were married August 19, 1974, in Brownwood, Texas?

A Correct.

Q And you separated on or about October 7, 1986?

A Yes.

Q Now, we have alleged in the petition, Ricky, that the marriage has become insupportable because of discord or conflict of personalities between the two of you that has

destroyed the legitimate ends of the marriage relationship; is that a true statement?

A Yes.

Q Do you believe that there is any reasonable expectation of reconciliation?

A No, I don't.

Q Okay. There were no children born or adopted to ya'll during the marriage, were there?

A No.

Q And she is not pregnant or not expecting any children at this time?

A No.

Q You have entered into an agreement as to the division of the property in the estate, have you not, sir?

A Yes, we have.

Q Essentially, it is your understanding that you would receive as your property the oak secretary, the rocking chair, the Sony television, the Canon camera with accessories, the 1977 Oldsmobile, all clothing, jewelry and other personal effects in your possession, any cash in your possession in any bank in your name, and any retirement that you might be entitled to through any plan at all; in addition, the accounts with Republic Bank, the charge card accounts of Visa and MasterCard with Republic Bank that are in your name?

A Yes.

Q And then Wanda would receive as her part of the division of the community property all other household furniture, furnishings, fixtures, anything else other than a few

things that we set out before?

A Yes.

Q She would also have her clothing, jewelry and other personal effects, she would have any and all cash in her possession or in her name and in a bank, any retirement plan that she has through the bank here that she works at, or anywhere else, and the 280-ZX, a motor vehicle Datsun car, and additionally the house that ya'll owned together, which is Lot 18, Block 10, Hillcrest Addition to the City of Sweetwater?

A Yes.

Q And additionally, she would then own as her separate property the account with Sears, Bealls and MasterCard through the First National Bank here in Sweetwater that are staying in her name?

A Yes.

Q Further, as part of the division, you will pay first any debts that you have incurred of any kind or any place since October 7, 1986, and any indebtedness against the 1977 Oldsmobile?

A Correct.

Q And she would have the duty to pay any debts that she has incurred since October 7, 1986, the balance payable on the Bealls card that she has incurred additionally, and the balance owed on the house that is set out as her separate property to the City Savings & Loan Association of Abilene; is that correct?

A True.

Q Ya'll would also be jointly responsible for Federal Income Tax liability through 1987?

A Right.

Q And then after that, ya'll will file separately?

A Yes.

Q Is that you understanding of the division of the community property?

A Right.

Q And do you believe that that is in the best interest of both of you?

A Yes, I do.

Q Essentially, she is getting quite a bit more than you are out of division; is that correct?

A True.

Q And are you asking the Court to approve that division?
A Yes.

MR. CONARD: Your Honor, that's all we have.

THE COURT: Divorce granted. Petitioner and Respondent are hereby divorced from each other. I will approve the property settlement agreement and if you think I can remember all that stuff, you are wrong.

MR. CONARD: I will set it out in the decree.

THE COURT: Fine.

(End of hearing)

THE STATE OF TEXAS
COUNTY OF NOLAN

I, Susan Cheney, Official Court Reporter in and for the Nolan County Court-at-Law, a Certified Shorthand Reporter and Registered Professional Reporter, do hereby that the above and foregoing pages contain a full, true and correct transcription of the proceedings had in the above styled cause.

Given under my hand and seal of office on this the

28th day of January, 1992.

/s/ Susan Cheney

Susan Cheney, Official, NCCL

1412 Tanya
Sweetwater, Texas 79556
915-235-8833 or 235-2353
Cert No. 707
Expiration date: 12/31/92

APPENDIX H.
No. CC-502

IN THE MATTER OF THE MARRIAGE OF	§	IN THE COUNTY
RICHARD LAMOND BRANDON AND WANDA SUE BRANDON	§	COURT AT LAW OF NOLAN COUNTY, TX.

DECREE OF DIVORCE

On the 30th day of March, 1988, Petitioner, RICHARD LAMOND BRANDON, (SS#462-98-1206), appeared in person and by attorney and announced ready for trial.

Respondent, WANDA SUE BRANDON, (SS#458-19-6432), waived issuance and service of citation by waiver duly filed and did not otherwise appear.

The Court, having examined the pleadings and heard the evidence and argument of counsel, finds that all necessary residence qualifications and prerequisites of law have been legally satisfied and that this Court has jurisdiction of all the parties and subject matter of this cause. A jury was waived, and all matters in controversy, including questions of fact and of law, were submitted to the Court. All persons entitled to citation were properly cited.

A record of testimony was taken by Susan Cheney.

IT IS DECREED that RICHARD LAMOND BRANDON, Petitioner, and WANDA SUE BRANDON, Respondent, be and they are hereby divorced.

The Court finds that there is no child of the marriage and that none is expected.

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party.

IT IS ORDERED AND DECREED that the property of the parties is divided as follows:

Petitioner is awarded the following as Petitioner's sole and separate property, and Respondent is divested of all rights, title, interest, and claim in and to such property:

(1) Oak secretary;

(2) Rocking chair;

(3) Sony television set;

(4) Canon 35 mm. camera and accessories;

(5) The 1977 Oldsmobile motor vehicle, together with all prepaid insurance, keys, and title documents, subject to any indebtedness thereon to First National Bank, Sweetwater, Texas.

(6) All clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Petitioner.

(7) Any and all sums of cash in the possession of or subject to the sole control of Petitioner, including money on account in banks, savings institutions, or other financial institutions, which accounts stand in Petitioner's sole name or from which Petitioner has the sole right to withdraw funds or which are subject to Petitioner's control.

(8) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights relating to any profit-sharing plan, retirement plan, pension plan, employee stock option plan, employee savings plan, accrued unpaid bonuses, or other benefit program existing by reason of Petitioner's past, present, or future employment.

(9) The VISA and Mastercard account with Republic Bank in Petitioner's name.

Respondent is awarded the following as Respondent's sole and separate property, and Petitioner is hereby divested of all right, title, interest, and claim in and to such property:

(1) All household furniture, furnishings, fixtures, goods, appliances, and equipment in the possession of or subject to the sole control of Respondent, except for the oak secretary, rocking chair, Sony television set and the Canon 35 mm.

camera and accessories.

(2) All Clothing, jewelry, and other personal effects in the possession of or subject to the sole control of Respondent.

(3) Any and all sums of cash in the possession of or subject to the sole control of Respondent, including money on account in banks, savings institutions, or other financial institutions, which account stand in Respondent's sole name or from which Respondent has the sole right to withdraw funds or which are subject to Respondent's sole control.

(4) Any and all sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights relating to any profit-sharing plan, retirement plan, pension plan, accrued unpaid bonuses, or other benefit program existing by reason of Respondent's past, present, or future employment.

(5) The 280ZX motor vehicle together with all prepaid insurance, keys, and title documents.

(6) The following real property, having the address of 1703 Marvin, Sweetwater, Texas, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, title and closing documents;

All of Lot Eighteen (18), Block Ten (10), HILLCREST ADDITION to the City of Sweetwater, Nolan County, Texas.

(7) The Sears, Bealls and Mastercard (issued through First National Bank, Sweetwater, Texas) accounts in Respondent's name.

IT IS ORDERED AND DECREED that Petitioner shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Respondent and Respondent's property harmless from an failure to so discharge these debts and obligations:

(1) Any and all debts, charges, liabilities, and other obligations incurred by Petitioner and after October 7, 1986, unless express provision is made in this decree to the contrary.

(2) The balance due, including principal, interest, and all other charges, on that certain promissory note payable to First National Bank, Sweetwater, Texas, and given as part of the purchase price of and secured by a lien on the 1977 Oldsmobile motor vehicle awarded to Petitioner.

IT IS ORDERED AND DECREED that Respondent shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold Petitioner and Petitioner's property harmless from any failure to so discharge these debts and obligations:

(1) Any and all debts, charges, liabilities, and other obligations incurred by Respondent from and after October 7, 1986, unless express provision is made in this decree to the contrary.

(2) The balance due and owing, including principal and interest, and all other charges, payable to Bealls and incurred by Respondent.

(3) The balance due, including principal, interest, tax and insurance escrow, on that certain promissory note executed by Richard L. Brandon and wife, Wanda A. Brandon, in the original principal sum of $27,200.00, dated May 22, 1987, payable to City Savings & Loan Association of Abilene, Texas, and secured by deed of trust on the real property herein awarded to Respondent and recorded in Vol. 66, Page 124, Official Public Records of Nolan County, Texas.

IT IS ORDERED AND DECREED that RICKY LAMOND BRANDON and WANDA SUE BRANDON shall be jointly responsible for all federal income tax liabilities of the parties from the date of marriage through December 31, 1987, and shall timely pay any deficiencies, assessments, penalties, or interest due thereon.

If a refund is made for overpayment of taxes for any year during the parties' marriage, each party shall be entitled to one-half of the refund, and the party receiving the refund check is designated as a constructive trustee for the benefit of the other party, to the extent of one-half of the total amount of the refund, and shall pay to the other party one-half of the total amount of the refund check within five days of receipt of the refund check.

IT IS DECREED that Petitioner and Respondent shall execute all instruments necessary to effect this decree and the Petitioner and Respondent have all appropriate and necessary writs, execution, and process, as many as often as is necessary to accomplish the execution and final disposition of this judgement.

All costs of court expended in this cause are adjudged against the party by whom incurred, for which let execution issue.

IT IS DECREED that all relief requested in this cause and not expressly granted herein be and is hereby denied.

SIGNED this the 30th day of March 1988.

/s/ Robert M. Faver
ROBERT M. FAVER,
Judge Presiding

CIVIL DOCKET

DIVORCE

Case No. CC-502

No. of Case Kind of Action and Filing	Style of Case Date of Case Party Demanding Jury	Attorneys
CC-502 Divorce	Richard L. Brandon 10-29-86 Vs. Wanda Sue Brandon	Frank Conard II

Date of Orders	ORDERS OF COURT
2-24-86	Letter of Dismissal sent Frank Conard
3-16-88	Not Dismissed (file ref. for setting from Frank Conard)
3-30-88	Pet. appeared (atty-Frank Conard) Resp. did not appear Divorce Granted! Property settlement agreement approved ROBERT FAVER

STATE OF TEXAS
COUNTY OF NOLAN

I, Vera Holloman, Clerk of the District Court for Nolan County, Texas, do hereby certify that this document is a true copy of the original record filed in my office.

Witness my hand and seal of said Court of Sweetwater, Texas this 21st day of January, 1992.

Vera Holloman, Clerk
By: Shirley Harris, Deputy